U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 26 April 2006

CASE NO.: 2006-SOX-20

In the Matter of

CAROL HERMAN TICE,
Complainant

v.

BRISTOL-MYERS SQUIBB COMPANY,
Respondent

Appearances:

For the Complainant,
Douglas C. Hart, Esq. and
Manning J. O'Connor, II, Esq.,

and

For the Respondent,
Judith E. Harris, Esq. and
Roger J. DeFortuna, Esq. and
Amy Sandgrund-Fisher, Esq.

Before: RICHARD A. MORGAN
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

BACKGROUND AND PROCEDURAL HISTORY

This action involves a complaint under the employee protection provisions of the Corporate and Criminal Fraud and Accountability Act, Title VIII of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, *et seq*. ("Sarbanes-Oxley," "SOX," or "Act" (enacted July 30, 2002) and the implementing regulations at 29 C.F.R. Part 1980.

On May 12, 2005, Complainant, Carol H. Tice, filed a complaint with the United States Department of Labor's Occupational Safety and Health Administration ("OSHA"), alleging that

her former employer, Respondent Bristol-Myers Squibb, Co. (hereinafter "Bristol-Myers") violated the Act. Complainant alleged that Respondent terminated her employment in retaliation for having reported to senior management officials that Respondent's sales representatives were providing false information concerning the number of sales calls they were making and that management pressured sales representatives to do so.

On September 27, 2005, following an investigation, OSHA found no reasonable cause to believe that the Respondent had violated the Act. Specifically, OSHA found, *inter alia*, that the Respondent had established by a preponderance of the evidence that Complainant's alleged protected activities were not a factor in her termination.

On November 4, 2005, the Complainant objected to OSHA's findings and requested a hearing before an Administrative Law Judge. On November 8, 2005, I issued a Notice of Hearing scheduling the matter for a hearing beginning on January 30, 2006 in Pittsburgh, Pennsylvania.

On January 10, 2006, the Respondent filed a Motion for Summary Dismissal and Memorandum of Law in support of that Motion. Respondent averred that it was entitled to summary decision because the Claimant could not establish that she engaged in activity protected by Act. On January 17, 2006, the Complainant filed a Memorandum of Law opposing the Motion for Summary Dismissal. In a separate Order, dated January 19, 2006, I denied the Motion.

A hearing was conducted January 30 through February 1, 2006. Complainant's Exhibits ("CX") 1-2, 4-13, and 19-20 were admitted in evidence. Respondent's exhibits ("RX") 2, 4, 6-9, 13-17, and 19 were admitted in evidence. The parties submitted closing arguments and legal briefs on March 31, 2006.

STIPULATIONS

The parties stipulate that:

1. Bristol-Myers is a Company covered by the Act.

2. Ms. Tice began working for a predecessor of the Respondent in July 1986 and was a Bristol-Myers employee at the time of her termination on April 13, 2005.

3. Ms. Tice is a covered employee, under the Act.

4. At the time of her termination, Ms. Tice's base pay was $91,368.00 per annum. She received a bonus in 2004 in the amount of $16,938.93.

5. Ms. Tice was a member of Bristol-Myers' Legion of Excellence.

6. The Complainant served as a Senior Territory Business Manager from July 2003 until the time of her termination.

7. On December 14, 2004, Ms. Tice met with Mr. Harry Broadus, District Business Manager, and discussed the accuracy of her sales call reports.

8. Ms. Tice sent a memorandum, dated December 18, 2004, to Kathleen N. Allard, Bristol-Myers' Regional Vice President, Immuno Science Division, and a copy to Kathryn Santos-Tharney, Human Resources Generalist, that stated, *inter alia*, her ". . . concern regarding appropriate business ethics as it relates to the accurate reporting of sales calls and the incredible pressure placed on representatives to misrepresent the number of sales calls."

9. Ms. Tice received a "field coaching summary," on or about February 9, 2005.

10. Ms. Tice received a Letter of Concern from the Respondent, on or about February 8, 2005.

11. Ms. Tice was terminated on April 13, 2005 at a meeting which was attended in person by Mr. Broadus and Mr. Paul Root, District Business Manager, and by Ms. Kathryn Santos-Tharney, Bristol-Myers' Human Resources Generalist, by teleconference.

12. Ms. Tice was terminated for falsification of sale calls records.

13. Ms. Tice did not receive any severance pay upon her termination.

14. Ms. Tice filed her complaint with OSHA, on May 12, 2005. It was timely filed.

ISSUES

1. Does Bristol-Myers qualify as a company covered by SOX, i.e., any company with a class of securities registered under section 12 of the Securities and Exchange Act of 1934 (15 U.S.C. 781) and any company required to file reports under section 15(d) of the Securities and Exchange Act of 1934 (15 U.S.C. 780(d))?

2. Whether the Complainant, Ms. Carol H. Tice, was an employee of the Respondent, Bristol-Myers, on the dates of the alleged protected activity in 2005?

3. Whether the Complainant, Ms. Carol H. Tice, engaged in protected activity under SOX, on December 18, 2005, or some other established date, that is, was she, or persons acting on behalf of her, about to provide or did provide their employer or the Federal Government information relating to any alleged or actual violation of any federal law relating to SOX activity, i.e., regarding any conduct which the employee reasonably believed constituted a violation of 18 U.S.C. §§ 1341,[1] 1343,[2] 1344,[3] or 1348,[4] any rule

[1] 18 U.S.C. § 1341 prohibits mail fraud.
[2] 18 U.S.C. § 1343 prohibits fraud by wire, radio, or television.
[3] 18 U.S.C. § 1344 prohibits bank fraud.
[4] 18 U.S.C. § 1348 prohibits securities fraud.

or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders?

4. If the Complainant, Ms. Carol H. Tice, engaged in protected activity as an employee of the Respondent, Bristol-Myers, whether the Respondent was aware of the protected activity?

5. Did the Complainant, Ms. Carol H. Tice, suffer unfavorable personnel actions, i.e. was she discharged or discriminated against in respect to compensation, terms, conditions, or privileges of employment?

6. If the Complainant, Ms. Carol H. Tice, engaged in protected activity as an employee of the Respondent, Bristol-Myers, and the Respondent was aware of the protected activity, did the protected activity contribute, in part, to the decision by the Respondent to discipline the Complainant, Ms. Tice, and to terminate Ms. Tice?

7. If the Complainant, Ms. Carol H. Tice, established a violation of the employee protection provisions of SOX , whether the Respondent, Bristol-Myers, demonstrated by clear and convincing evidence that it would have disciplined Ms. Tice and/or terminated Ms. Tice, even in the absence of the protected activity?

FACTS

Preliminary Facts

Bristol-Myers, among other activities, maintains a nation-wide force of about 4,000 sales representatives. The employees are largely "at-will" employees. It is involved in a contractual relationship or joint venture with Sanofi to co-promote and market the latter's three drugs, Avalide, Avapro, and Pravachol. The company is compensated for sales calls/visits involving those drugs, according to Ms. Allard, a Regional Vice President. Those drugs and others are marketed by the Bristol-Myers sales representatives, who are provided with company minimum expectations which, among other matters, establish the minimum number of sales calls to be made each day and a target revenue goal. (CX 1; TR 223-4).

The expected revenue goal and expected number of sales calls per day ("call plan" or "START Plan") are developed by a central sales management office. In 2004, cardiovascular specialists, such as Ms. Tice, were expected by Bristol-Myers to make 7.5 face-to-face calls on targeted healthcare providers per day on average. (CX 1). Those pedaling non-specialized prescription drugs were expected to make 10 such calls to prescribers per day on average. (CX 1). It is important for the sales representatives and their district managers to achieve these minimums as that qualifies them for incentive bonus pay. The bonus itself is calculated based on the amount of sales not the number of sales calls. But, when adherence to the sales call plan is below 80%, the bonus is decreased. (TR 224).

The sales representatives are provided with samples of prescription drugs to give potential prescribers, as a marketing tool. Bristol-Myers required and maintained strict

accountability for these samples. Bristol-Myers' Sample Accountability Policies and Procedures included a progressive discipline policy for failure to accurately reconcile samples.

Sales representatives are divided into local, geographic, "district" teams of a dozen or so employees further divided into two-person "pods" all of whom are supervised by a District Business Manager ("DBM"). In turn, the various DBMs and their sales teams are supervised by various regional vice presidents. In this case, Ms. Tice served on a team of a dozen or so sales representatives which was supervised by Mr. Harry L. Broadus, with one pod mate, Greg Lane. Mr. Broadus, in turn, was under the supervision of Ms. Allard, Regional Vice President of Sales, Immunopharmacology. Ms. Tice was one of two highly specialized sales representatives in her district, promoting prescription drugs to the cardiovascular, neurology, and endocrinology medical communities. Ms. Tice, Mr. Broadus and Ms. Allard all testified at the hearing.

Ms. Tice was and is a licensed pharmacist. She was a Senior Territory Business Manager-Specialty. (CX 19, page 7). She is highly articulate and achieved notable successes during her nineteen years with Bristol-Myers. Over her career she earned several sales awards and, in 1995, the coveted Bristol-Myers Legion of Excellence, placing her in the top 100 of the company's 4,000 sales force. She was promoted several times and received raises with each, as well as annual sales bonuses. Before 2005, she had never been disciplined.

In 2004, Ms. Tice switched Bristol-Myers districts from Pittsburgh North to Pittsburgh South, an area new to her. The transition was difficult for her and she suffered some frustrations with her colleagues in addition to losing her work ("pod") partner, in December 2004, which increased her work load. She testified that Mr. Broadus' ten sales call goal, which exceeded Bristol-Myers' company-wide minimum, put her under intense pressure. It was difficult if not impossible to accomplish every day, in her opinion. Among her duties was marketing four to five different prescription drugs via sales calls and other methods. Her IC Plan Scorecard and annual performance report show that she increased sales and Bristol-Myers' market share in Pittsburgh South as 2004 progressed. (CX 2, 6).

Seeking to out-perform Bristol-Myers' expectations, her District Business Manager, Mr. Broadus, "expected" his specialized sales representatives, like Ms. Tice, to make ten sales calls per day. Mr. Broadus initially denied this, but after being confronted with Ms. Tice's annual performance review, he testified that although that was his expectation, he never "required" ten sales calls per day. Mr. Broadus testified that he had accompanied sales representatives who were "frequently" able to make ten sales calls in a day.

Bristol-Myers determined it needed to maintain closer control of its prescription drug samples handled and distributed by its sales representatives in connection with sales calls. It thus developed rigorous codes of conduct and standards. Bristol-Myers has a December 1998, "Code of Conduct for Sales Representatives, Sales Force Management and Others Promoting USPG Pharmaceuticals". (RX 15). The Code of Conduct for Sales Representatives explicitly states that "[F]ailure to comply with ..(it), the Goodwill Policy or any of the other referenced policies and procedures may result in disciplinary action, up to and including termination of employment for cause." (RX 15, p. 1).

The Code of Conduct for Sales Representatives further states:

15. Standards Governing Call Reporting
I am expected to make a certain number of calls based on the direction given by sales management. . . I will accurately and appropriately report all sales call activity . . . to the Home Office by computer transmittal or by completing the appropriate divisional Sales Call Report Form (SAC Card). I understand that customer calls must be recorded on a daily basis, must reflect the actual call date, and must not be aggregated to reflect multiple working days.

Face-to-Face Calls
I understand that I can record a face-to-face call with a customer only when one or more product attributes are presented to the customer along with a request to prescribe. I understand that face-to-face calls can occur in a variety of contexts (e.g., traditional office-based visit, A DME/speaker program, a hospital display, etc.). . . [Calls in which no drug samples are left are referred to as "Detail" calls].
(RX 15, pp. 3-4).

The Code also refers to the Bristol-Myers' disciplinary process, stating:

Failure to adhere to any of the standards contained in this Code of Conduct, including the Goodwill Policy or any other Company policy referenced herein, may result in disciplinary action based on the type and severity of the violation. Certain violations of this Code of Conduct, whether intentional or inadvertent, may be judged so severe that they result in disciplinary action which bypasses the Progressive Discipline Process entirely and results in immediate termination for cause.
(RX 15, p.9).

Immediate Termination
Certain violations of this Code of Conduct result in immediate termination for cause (i.e., without severance). Examples include, but are not limited to, the following:
. . .
Falsification of any Company document, including call reports and expense Reports. Falsification of call reports includes, but is not limited to, reporting a call on a date other than the date on which the call was made or reporting a visit to a customer that meet the definition of a call (as defined by each division's call reporting system). . . (RX 15, p.11).(Emphasis added).

The Bristol-Myers Standards of Business Conduct and Ethics (November 2004) provide that it "will not discharge, demote, suspend, threaten, harass or in any manner discriminate, in any term or condition of employment, against an employee who makes a report (of misconduct or violation of law) in good faith." (CX 20, p. 4). Any employee violating the Standards "may be subject to disciplinary action, including, where appropriate and permissible, the termination of employment." (CX 20, p. 4). The Standards proscribe employees from "creating records that fail to reflect accurately the nature of transactions." (CX 20, p. 6).

Bristol-Myers also maintains a Compliance Code of Conduct (June 4, 2004) which contains standards governing call reporting by sales representatives:

> Sales representatives are expected to make a certain number of calls based on the direction given by Sales Management. During these calls, it is the objective of sales representatives to provide product information consistent with the [Bristol-Myers] promotional strategy and request prescribers to prescribe [Bristol-Myers] products where appropriate. Sales representatives must accurately and appropriately report all sales call activity and Time AR daily to Sales Management by . . . Sales representatives must record customer calls on a daily basis. The records must reflect the actual call date and must not be aggregated to reflect multiple working days. (RX 14, p. 8).

The Compliance Code of Conduct further prohibits any form of unlawful harassment and promises complaints of the same will be investigated by the Human Resources Department. Further, it proscribes retaliation against those making good faith reports of harassment or discrimination. (RX 14, p. 12). It encourages reports of improper conduct, commits to investing such reports and to non-retaliation against the maker of the report. (RX 14, p. 21-22). The Compliance Code also sets forth the company's progressive disciplinary process, which includes coaching, letters of concern, letter of probation, written warnings, and termination. (RX 14, pp. 15-19). Bristol-Myers considers falsifying the number of physicians visited or falsification of call reports, including, but not limited to, reporting a call on a date other than the date on which it was made or reporting a visit to a customer that does not meet the definition of a call, as "so severe" as to warrant immediate termination. (RX 14, pp. 18).

The parties stipulated that Bristol-Myers maintained a co-promotional contract with Sanofi, in June 2002 and at all times relevant to this matter. (TR 517). Ms. Tice and other Bristol-Myers employees were aware of the relationship. Ms. Tice had a reasonable basis to conclude that if Bristol-Myers did not meet the terms of its agreement with Sanofi, specifically minimum sales call requirements for Avapro and Avalide, manufactured by Sanofi, that Bristol-Myers could incur a substantial penalty or be forced to refund a substantial portion of the monetary consideration it received from Sanofi. Her former supervisor, Ellen Wheeler-Bailey had suggested this to her. The other Bristol-Myers employees testifying at the hearing were similarly aware of the relationship with Sanofi.

Facts Surrounding Alleged Protected Activity

Shortly before Mr. Broadus, the District Business Manager, took short term disability, April through September 2004, two of his sales representatives, James Gervase and Beth Skavronski, complained to him that Ms. Tice was reporting sales calls on doctors outside her territory. Although these two "high value" physicians, Drs. Izzo and Mignella, were on Ms. Tice's START list, that is they were provided by the company, they were listed in the wrong

territory. Mr. Broadus did not act on the complaint.[5] However, some time shortly after he returned from his short term disability, probably in November 2004, the representatives raised the complaint again so he felt obliged to inquire. He informed his boss, Ms. Allard, in November 2004, of the matter, involving Drs. Izzo and Mignella. (TR 216). They were concerned about what they thought was an unusual discrepancy between Ms. Tice's detail calls and the sales calls where she had left drug samples with physicians. (TR 409). The latter calls require the representatives to record a physician signature, the detail calls do not. Ms. Allard instructed Mr. Broadus to start looking into the matter. (TR 411).

Ms. Allard testified that she reviewed Ms. Tice's CallMax report, in November 2004, and confirmed what Mr. Broadus had told her.

Mr. Broadus met with Ms. Tice, on December 14, 2004, to discuss the matter of the two doctors (Drs. Izzo and Mignella) who were no longer in her territory and her recording of sales calls on them. The meeting transpired as he reported in his December 14, 2004, memorandum sent to Ms. Allard. (RX 4). Initially, Ms. Tice explained that the doctors' names had not been removed from her IC list because she was new to the Pittsburgh South territory and attributed some blame to her new partner, Greg Lane. It requires two representatives' concurrence to remove names from the list. After Mr. Broadus provided specific details/dates regarding the sales calls she had entered into the computer system, Ms. Tice said she had listed the calls because the doctors were on her call plan and eventually admitted she was "guilty as charged." Mr. Broadus stated his concern about Ms. Tice's low sampling rate, i.e., 10-15%, of the physicians she had called upon in any given month. He reported Ms. Tice said, "I don't play that game." Mr. Broadus also expressed his concern over Ms. Tice's failure to record calls in the company computer and that he had been informed of a samples reconciliation discrepancy by her SMART partner. He informed her that the latter matter would likely result in some discipline. He told her he had spoken to Ms. Allard and made three recommendations for improvement. After the meeting, Mr. Broadus called Ms. Allard to inform her, prepared his memorandum and sent it to Ms. Allard. (RX 4).

Although, at the time, Mr. Broadus suspected Ms. Tice's sales call IC list may have also contained the names of other physicians not in her territory and he mentioned that to Ms. Allard, he did not mention that to Ms. Tice.

At the hearing, Ms. Tice again admitted that although she recorded calls on these doctors, she never, in fact, visited them. (TR 132). Ms. Tice also testified that the December 14, 2004 meeting prompted her to expose what she believed was an unethical and fraudulent call representative system.[6] (TR 80). She had consulted legal counsel. She testified she then sent her December 18, 2004, "Meeting Request" to Ms. Allard, whose office is in Atlanta, by regular mail through the corporate offices in New Jersey. She sent a copy of this letter to Ms. Santos-

[5] Mr. Broadus testified that he and his family were forever "indebted" to Ms. Tice for rushing him to the hospital when he became critically ill during a meeting. Moreover, Ms. Tice went above and beyond her duties by taking Mrs. Broadus to the hospital. Mr. Broadus became emotional when he testified that he had " a lot of angst" about the process, but had to do what business required regardless of his personal feelings.

[6] Ms. Kathleen McElarney's notes reflect Ms. Tice was in shock over the December 14 meeting and felt she was being "set-up" and that is why she wrote the December 18, 2004 letter. (CX 19, pp. 45).

Tharney. (CX 5). It is this letter, addressing three concerns that she alleges was her protected activity. It was her first written report concerning these matters.[7]

Ms. Tice's December 18, 2004 letter asked for a meeting with Ms. Allard, expressed her desire to continue working for the company, and set forth three concerns or beliefs:

1. That Harry (Mr. Broadus) and others (unnamed) have been retaliating against her because of an earlier sexual harassment claim she had made;
2. That Harry "may improperly perceive me as not being able to do my job because of her medical condition;[8] and,
3. Her concern "regarding appropriate business ethics as it relates to the accurate reporting of daily sales calls and the incredible pressure placed upon representatives to misrepresent the number of sales calls." (CX 5).

Ms. Allard had been instructed by Human Resources to let them handle the matter and not directly contact Ms. Tice; so, she did not contact or meet with Ms. Tice. (TR 215, 242, 247).

Ms. Tice testified:

> by telling [HR] these things, that at least at the district level I would get some relief from the ten sales calls per day average and we could say, you're just responsible for seven and a half, not ten. . . That's why you call HR. I assumed that I would get some help; some action.

(TR 174).

I find the first two concerns or allegations, concerning sexual harassment and discrimination, are so overtly spurious as to hardly warrant further discussion, beyond that incidentally set forth below.

Post-Complaint Investigation and Activities

When, after some time, Ms. Allard received the letter, she called Bristol-Myers' Human Relations Department to determine how to handle the matter, but did not initially inform Mr. Broadus of the December 18, 2004 letter. Ms. Allard testified that she asked Ms. McElarney to fully investigate Ms. Tice's complaints. Mr. Broadus testified he never saw the December 18 letter or the March 2, 2005 report until the hearing. Ms. Allard never contacted Ms. Tice directly concerning either the December 18 letter or the concerns over the falsely reported sales calls.

Ms. Tice got her annual performance evaluation, on January 10, 2005. (CX 6). It made no reference to the investigation or Ms. Tice's allegations, as a matter of company policy. That policy was not to refer to allegations until any investigation was complete. The Assessment

[7] She testified that she had previously spoken of it, as it related to the 2002 June-Jump Contest, to her prior supervisor Ellen Weaver Bailey and vaguely to Jim Billick and her first boss. Ms. Tice's statement to OSHA relates she first became aware of the problem at the June-Jump. (p. 6-7). However, that is not the subject of the current complaint.

[8] TIA or transient ischemic attacks and high blood pressure.

reflected "all observed behaviors in compliance with all applicable regulations and [Bristol-Myers'] policies." It shows Ms. Tice's improving attainment results in her new territory and that she was "fully performing" most of her core Bristol-Myers behaviors. (CX 6). However, other than for Plavix, she fell short of her IC goal attainment for three of the other drugs she was responsible for promoting. It reflected an "expectation" of 10 sales calls per day and that she had 9.9. (CX 6). Mr. Broadus testified that Ms. Tice performed "satisfactorily."

Ms. Kathleen McElarney is a Bristol-Myers managerial Employee Relations employee assigned to investigate alleged the more serious "level 3" violations of regulations or company policy, in the eastern half of the United States. In 2004 alone, she conducted 30-50 such cases. Since February 2002, when the company began investigating such matters, she had recommended termination in all cases where the falsification of sales calls was confirmed (about 35 cases) and each such case the employee had been terminated without any severance pay.

Ms. McElarney testified that she was alerted to the Tice matter, on January 19, 2005, by Ms. Santos-Tharney of Human Relations who had provided Mr. Broadus' notes. (CX 19; RX 2). Ms. Santos-Tharney informed her she had spoken with Ms. Tice and Mr. Broadus and both had confirmed the falsification. Ms. Santos-Tharney had contacted Ms. Tice about the December 18 letter allegations and the sales call falsification allegation, on January 11, 2005. (RX 2; CX 19, pp. 26-34). Ms. Tice informed Ms. Santos-Tharney that Bristol-Myers' sales representatives were engaging in fraudulent activity as a result of the incredible pressure from Bristol-Myers' management. (CX 19, pp. 32-34).

Ms. McElarney considered the matter to involve two investigations: first, the fraudulent call reports and, second, Ms. Tice's December 18 allegations. (TR 332). Ms. McElarney testified that she "reached out" to Ms. Tice, on February 9, 2005, and spoke to her on February 10, 2005, regarding the latter's December 18, 2004 letter. Before contacting Ms. Tice, however, she corresponded with Mr. Broadus via email, on January 21, 2005. (RX 13 and RX 7).

On January 5, 2005, Mr. Broadus had faxed additional documentation to Ms. Allard, concerning sixteen calls to Dr. Arshad Mahmood from January 12 through November 19, 2004 and nine calls to Dr. Azouz between April 6 and November 11, 2004. (RX 13).

Ms. McElarney asked Mr. Broadus: 1. if he had inquired into Ms. Tice's CallMax activity based on her 77% IC goal attainment; 2. how long Dr. Izzo, one of the two doctors reportedly falsely called, had been out of the area; 3. whether he had confirmed Ms. Tice had not visited Dr. Mahmood, also outside her territory and for whom sixteen detail calls had been recorded; and, 4. whether he had confirmed Ms. Tice had not visited Dr. Azouz's office, also outside her territory and for whom nine detail calls had been recorded. (RX 13).

Mr. Broadus responded via email, on January 31, 2005. (RX 7). At that time, he was unaware of Ms. Tice's December 18 letter. He explained he looked into Ms. Tice's call activity because of the complaints he had gotten by the CRS specialists who actually call upon those physicians and because of her territories poor performance (IC goal attainment). He wrote that Dr. Izzo practices in Erie, PA, 120 miles away, and had not practiced in the Pittsburgh area in years. He noted Dr. Mahmood is listed with a practice at Mercy Hospital, maintains space there,

but does not practice there. He reiterated Ms. Tice had admitted the falsification to Ms. Santos-Tharney and him and that she had claimed "pressures" to meet START adherence requirements. Mr. Broadus observed that appeared to be a Code of Conduct policy violation. Finally, he noted Ms. Tice would be getting a Letter of Concern, on or about February 11, 2005, from Samples Management for unreconciled inventory variances. (RX 7).

Ms. McElarney testified that she discussed the alleged false call reports and December 18 letter with Ms. Tice over the telephone. She learned that the alleged sexual harassment complaint related to a 1991 incident at a local place involving company employees and a "stripper" over which Ms. Tice had complained. Ms. Tice was unable to give her any examples of how Mr. Broadus discriminated based on her medical condition from December 14, 2004 on. They also discussed Mr. Broadus' requirement for ten sales calls per day. Ms. Tice admitted her guilt to falsification. Although Ms. Tice told her she knew others who had falsified their call reports, she never provided Ms. McElarney with the names.[9] Although attempts were made to conduct follow-up with Ms. Tice, they did not work out, as the emails between Ms. Tice and Ms. McElarney reflect. At the hearing, Ms. Tice testified that she has a directory which shows her former partner, Mr. Lane, who no longer works for the company, as having reported sales calls he had not actually made.[10]

Ms. McElarney spoke with Mr. Broadus about the December 18 allegations, on or about February 22, 2005. Mr. Broadus was unaware of the 1991 "stripper" matter and was not working for the company then. Mr. Broadus was unwillingly made aware of Ms. Tice's medical condition at their December 14 meeting, but denied any discrimination based on Ms. Tice's medical condition. He denied that he "required" ten sales calls per day, but that his sales representatives averaged 9-10 such calls per day although eight are required. Mr. Broadus told her he got the information relating to Drs. Izzo and Mignella from Ms. Tice's CallMax reports. He also confirmed that Ms. Tice had admitted falsifying the call reports. When asked, Mr. Broadus denied any other sales representatives had falsified reports.

Ms. McElarney did not personally access Ms. Tice's CallMax records. She only interviewed Mr. Broadus and Ms. Tice, about the allegations. Ms. McElarney did not interview any other member of Mr. Broadus' sales team to ask if they had falsified records. She had received Ms. Santos-Tharney's input, as noted. She concluded the sexual harassment and medical condition harassment complaints were unfounded. Absent names of other sales representatives who might have falsified reports, she chose not to investigate that matter further given the company has over 2,000 such representatives. She summarized her investigation in a report, dated March 2, 2005. Her "Key Factual Findings" were: "Tice admitted that she recorded 22 calls and never saw the physicians-her reply to this was that 'I am guilty as charged" and "Regarding the claim of retaliation and being treated differently due to medical condition, there

[9] Ms. McElarney's notes reflect Ms. Tice informed her "falsification is happening everywhere" and "other reps are doing the same thing." (CX 19, pp. 42-43). Ms. Tice felt inexplicably "singled-out." (CX 19, p. 43).

[10] There is no evidence she informed the company of this prior to her termination.

is no corroborating facts to substantiate these allegations."[11] Ms. McElarney recommended Ms. Tice's termination for cause for a violation of Bristol-Myers Squibb Compliance Code of Conduct. (RX 2).

Ms. McElarney contacted Ms. Allard, the decision-maker, with her findings and recommendations. Ms. Allard testified that as a Legion of Excellence member, Ms. Tice was held up as a model. Ms. Allard agreed that a confirmed violation of the Code of Conduct had occurred and that Ms. Tice would be terminated for that cause. Ms. McElarney admitted, at the hearing, that her report did not address all of Ms. Tice's allegations, but her notes and file had more details. (CX 19).

Mr. Broadus was notified by Ms. Santos-Tharney, Human Resources, in mid-April 2005, that Ms. Tice was to be terminated and directed him to set up a termination meeting and take a back-up along. He had Mr. Root, his district trainer accompany him, on April 13, 2005. Mr. Broadus testified he did not feel good about Ms. Tice's termination and had angst over it. Ms. Santos-Tharney essentially ran the meeting by telephone. She informed Ms. Tice she was being terminated because of the finding of false sales calls. Ms. Tice testified that she felt nevertheless she was terminated for her complaint of fraud in sales call reporting noting sales call inflation is part of the industry culture.

Ms. Allard testified that she had not been informed of the "stripper" incident prior to the hearing. Although she was aware Human Resources would investigate the "medical condition" allegation, she testified that she was never informed of the result of any full investigation of the same. Ms. Allard testified that she was not concerned with the allegation that others might have falsified sales records, except concerning Ms. Tice, as she has 140 sales representatives "who can be honest." Ms. Allard was not shown the March 2, 2005 final report of investigation.

Collateral Facts

Less than a month after she submitted her December 18, 2004 letter, Ms. Tice received her year-end assessment, prepared by Mr. Broadus, which reflected either positive or neutral comments. The assessment did not mention either the samples reconciliation problem or the falsification of sales calls because the investigation was in progress or pending and remained as yet unconfirmed by Bristol-Myers' HR and employee relations sections.

In January or February 2005, Ms. Allard sponsored a Regional Round-up to assess and train sales representatives within her region. Ms. Tice, among others, attended and was given notice of the meeting. During the course of the Round-up her performance was found lacking in some respects and she was given additional training and coaching. In spite of Ms. Tice's concerns, I find no nefarious motives or actions by Bristol-Myers' employees surrounding this event or her participation in it. Nor does this training constitute an adverse employment action.

[11] Her findings only addressed the false report of twenty-two sales calls to Drs. Izzo and Mignella. This is in spite of the fact Mr. Broadus had faxed a handwritten sheet concerning suspected false reports of twenty-six sales calls to Drs. Azouz and Mahmood. (CX 19, p.38).

On February 8, 2005, Ms. Tice was given a Letter of Concern ("LOC"), by Mr. Broadus for her failure to reconcile inventory variances for 2004, third quarter. (CX 7). This dealt with missing Coumadin samples.[12] It reflected she would be probation for 60 days and gave her direction of the steps needed to graduate from probation by meeting company goals and expectations. If she did not meet them, it informed her she would be terminated. Although Mr. Broadus testified that the actual LOC came from Samples Management, a separate arm of the company, it was he who gave it to Ms. Tice. Ms. Tice successfully met company goals and expectations and was taken off probation. CX 8 sets forth Bristol-Myers' Sample Accountability Policies and Procedures. Ms. Tice was concerned that the company had not followed its normal progressive discipline policy concerning the sample matter although she and Mr. Broadus had discussed the matter at the December 14 meeting. (CX 8, p. 42). However, while the Sample Non-Compliance Policy is couched in terms of "progressive" discipline, it makes clear the company may, at its sole discretion, impose a higher level of discipline. (CX 8).

On February 8, 2005, Ms. Tice received a Field Coaching Summary from Mr. Broadus. (CX 9). Mr. Broadus testified that this was not a disciplinary mater, but a training aid. The form reflects Ms. Tice needed to increase her call activity "to levels which meet or exceed both region and district." It reflects she averaged 7.5 sales calls per day versus the 8.5 expectation. It showed her IC Goal attainment at 131 percent. (CX 9). I find no nefarious motives or actions by Bristol-Myers' employees surrounding this event. This coaching does not constitute an adverse employment action.

Ms. Tice testified that she was notified, in March 2005, that she was not getting a merit pay raise and was chagrinned because her territory "attainment" had increased from 66% to 115%. (CX 18; RX 1-m). In fact, for the week of March 11, 2005, she was in the top 20 of sales representatives nation-wide in sales of Avapro and the top 47 with Avalide. (CX 10; CX 11). On March 11, 2005, Mr. Broadus emailed her congratulations as the territory was in the top 25 nation-wide selling Pravachol. (CX 12). In February 2005, she was 35th of the top 50 sales drivers of Pravachol. (CX 13). A company report for the period of October through December 2004, showed dollar sales in her territory of each of the drugs she was responsible for, except Coumadin and Pravastatin, substantially increased. (CX 2). The fact Ms. Tice did not receive a bonus for 2004 is not an adverse employment action, as the bonus is itself triggered by an objective, mathematical formula which Ms. Tice had not met. (TR 106, 218, 224; CX 6).

A day before the actual termination meeting, Mr. Broadus was contacted by Mr. Zinger, of Bristol-Myers' Imaging Division, where Ms. Tice had applied for work. He informed Mr. Zinger the decision had been made to terminate Ms. Tice. There had been some earlier correspondence concerning Ms. Tice's application for the other job with the intent of keeping all the relevant departments properly informed. (CX 19, p. 53).

Ms. Tice has not worked since her April 13, 2005 termination by Bristol-Myers. At the time of the hearing, she was in negotiations with Giant Eagle pharmacies, which she had contacted in November 2005, for part-time work as a pharmacist. Giant Eagle conveyed a verbal

[12] At the hearing, Ms. Tice admitted not being able to account for 3-4 cases of Coumadin, each containing twenty boxes with ten tablets or doses each. (TR 192).

job offer at $50.00 per hour with about twenty-four hours per month. She has not applied for other sales representative jobs.

LAW

The Act

The Act states:

No company with a class of securities registered under section 12 of the Securities and Exchange Act of 1934 (15 U.S.C. 78*l*), or that is required to file reports under section 15(d) of the Securities and Exchange Act of 1934 (15 U.S.C. 78*o*(d)), or any officer, employee, contractor, subcontractor, or agent of such company, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms or conditions of employment because of any lawful act done by the employee--

(1) To provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of section 1341,[13] 1343,[14] 1344,[15] or 1348,[16] any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by-

(A) a Federal regulatory or law enforcement agency;
(B) any Member of Congress or any committee of Congress; or,
(C) a person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or

(2) to file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer) relating to an alleged violation section1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

18 U.S.C. Section 1514A. Civil Action to Protect Against Retaliation in Fraud Cases.

Applicable Regulations and Elements of Entitlement

In *Brune v. Horizon Air Industries, Inc.*, ARB No. 04-037, ALJ No. 2002-AIR-8 (ARB Jan. 31, 2006), the Administrative Review Board ("ARB" or "Board") clarified a common misconception concerning the appropriate regulatory standard in a whistleblower case before an Administrative Law Judge. Specifically, it explained that the *prima facie* case standard does not

[13] 18 U.S.C. § 1341 prohibits mail fraud.
[14] 18 U.S.C. § 1343 prohibits fraud by wire, radio, or television.
[15] 18 U.S.C. § 1344 prohibits bank fraud.
[16] 18 U.S.C. § 1348 prohibits securities fraud.

apply at the hearing level, but instead only applies during the preliminary investigatory stage of the proceeding before OSHA. *Brune*, ARB No. 04-037 at 12.[17] At the hearing stage- when the case is before an Administrative Law Judge or ARB- a complainant must "demonstrat[e]…that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint." *Id*. at 13

As the Board explained in *Brune*, the relevant distinction is the burden of proof imposed on a complainant. A *prima facie* case is defined as "[t]he establishment of a legally required rebuttable presumption" or "[a] party's production of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor." *Id.* at 12-13 (citing BLACK'S LAW DICTIONARY at 1209 (7th ed. 1999)). The burden imposed at the hearing stage, however, requires that a complainant "demonstrate" the requisite elements of entitlement. "Demonstrate," the Board continued, "means to prove by a preponderance of the evidence." *Id.* at 13n.33 (citing *Dysert v. United States Sec'y of Labor*, 105 F.3d 607, 609-10 (11th Cir. 1997). Therefore, a complainant's burden at the hearing stage is higher as merely raising an *inference* is insufficient; rather, a complainant must *prove* unlawful discrimination. *Brune*, ARB No. 04-037 at 14 (emphasis added).

Therefore, the applicable regulation setting forth the Complainant's burden is 29 C.F.R. § 1980.109(a), which states, "A determination that a violation has occurred may only be made if the complainant has demonstrated that protected behavior or conduct was a contributing factor in the unfavorable personnel action alleged in the complaint."

In *Reddy v. Medquist, Inc.*, ARB No. 04-123, ALJ No. 2004-SOX-35 (ARB Sept. 30, 2005), the Board put forth four elements that a complainant must prove to satisfy the burden under § 1980.109:

(1) The complainant engaged in protected activity;
(2) The named person knew that the complainant engaged in protected activity;[18]
(3) The complainant suffered an unfavorable personnel action; and,
(4) The protected activity was a contributing factor in the unfavorable action.

Reddy, ARB No. 04-123 at 7.

If the Complainant satisfies this burden, thereby proving discrimination by a preponderance of the evidence, the Respondent may then avoid liability by demonstrating "by clear and convincing evidence that it would have taken the same unfavorable

[17] *Brune* arose in the context of an alleged violation of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR 21"). As prescribed by 18 U.S.C. § 1514A(b)(2), an action under the Act is governed by 49 U.S.C. § 42121(b) and the procedural rules for AIR 21. *See also Reddy*, *infra* ARB No. 04-123 at 7 (stating that "[t]he legal burdens of proof set forth in [AIR 21] govern [Sarbanes-Oxley] actions."

[18] Though not specifically mentioned in 20 C.F.R. § 1980.109(a), the requirement that protected activity must have contributed to a respondent's decision to take an unfavorable personnel action assumes that the respondent knew about the complainant's protected activity. *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004) at 6.

personnel action in the absence of any protected activity." 29 C.F.R. § 1980(a); *Brune*, ARB No. 04-037 at 14.[19]

DISCUSSION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

Jurisdiction

The parties stipulated and I find that Bristol-Myers qualifies as a company covered by SOX, i.e., any company with a class of securities registered under section 12 of the Securities and Exchange Act of 1934 (15 U.S.C. 781) and any company required to file reports under section 15(d) of the Securities and Exchange Act of 1934 (15 U.S.C. 780(d)). Moreover, the parties stipulated and I find that the Complainant, Ms. Tice, was an employee of the Respondent, Bristol-Myers, on the dates of the alleged protected activity in 2005, and was covered by the Act. The parties stipulated and I find that the complaint was filed on May 12, 2005, and thus, was timely filed.[20]

Protected Activity

To establish a SOX violation, the Complainant must establish that she engaged in activity protected by the Act.

The applicable regulation defines "protected activity" as any lawful act:

> (3) To provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of 18 U.S.C. [§§] 1341,[21] 1343,[22] 1344,[23] or 1348,[24] any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders, when the information or assistance is provided to or the investigation is conducted by-
>
> (i) A Federal regulatory or law enforcement agency;
>
> (ii) Any Member of Congress or any committee of Congress; or,
>
> (iii) A person with supervisory authority over the employee (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct); or
>
> (4) To file, cause to be filed, testify, participate in, or otherwise assist in a proceeding filed or about to be filed (with any knowledge of the employer)

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[19] In my introductory remarks at the hearing, I referenced a burden-shifting approach commonly cited before the issuance of *Brune*. Application of that standard versus the one highlighted in *Brune*, however, does not change the outcome of this particular case. Under either, the Complainant must ultimately prove discrimination to prevail. Because, for the reasons stated *infra*, she is unable to do so, her claim would not succeed under either approach.

[20] An action shall be commenced, by filing a complaint with the Secretary of Labor (OSHA) not later than 90 days after the date on which the violation occurs. 18 U.S.C. Section 1514A(b)(1)(A) and ((2)(D).

[21] 18 U.S.C. § 1341 prohibits mail fraud.

[22] 18 U.S.C. § 1343 prohibits fraud by wire, radio, or television.

[23] 18 U.S.C. § 1344 prohibits bank fraud.

[24] 18 U.S.C. § 1348 prohibits securities fraud.

> relating to alleged violations of 18 U.S.C. [§§] 1341, 1343, 1344, or 1348, any rule or regulation of the Securities and Exchange Commission, or any provision of Federal law relating to fraud against shareholders.

29 C.F.R. § 1980.102(b).

To establish protected activity, the Complainant must only establish that she reasonably believed that the Respondent engaged in a fraud enumerated under the Act; she need not prove the accuracy of the allegation. *Halloum v. Intel Corp.*, 2003-SOX-7 at 15 (ALJ March 4, 2004), *aff'd*, ARB No. 04-068 (ARB Jan. 31, 2006). The Complainant's belief must be scrutinized under both subjective and objective standards such that she must actually believe that the Respondent was in violation of an enumerated fraud and that belief must be reasonable. *Lerbs v. Buca di Beppo, Inc.*, 2004-SOX-8 at 13 (ALJ June 15, 2004)(citing *Melendez v. Exxon Chem. Am.*, ARB No. 96-051, ALJ No. 1993-ERA-6 (ARB July 14, 2000)).[25] Moreover, the Complainant need not have specifically identified the law or regulations she believed the Respondent was violating. *Collins v. Beazer Homes USA, Inc.*, 334 F.Supp.2d 1365, 1377 (N.D. Ga. 2004). Protected activity, however, must be specific in relation to a given practice, condition, directive, or event. *Peck v. Safe Air Int'l, Inc.*, ARB No. 02-028, ALJ No. 2001-AIR-3 (ARB Jan. 30, 2004).

The Complainant alleges that she was terminated for raising concerns regarding inaccurate sales call reporting by Bristol-Myers' representatives and the pressure Bristol-Myers' management placed on representatives to misrepresent sales calls. She conveyed these concerns in her December 18, 2004 letter (CX 5) and in several conversations with Bristol-Myers' officials. To support her allegation of inaccurate sales call reporting, Complainant admitted to falsely recording twenty-two sales calls and stated that other representatives also falsified calls. With respect to her allegation of pressure to misrepresent data, the Complainant pointed to Mr. Broadus' demands that his representatives record ten sales calls per day, exceeding the Bristol-Myers goal.

The Complainant further asserts that she believed this alleged activity to constitute a fraud against shareholders.[26] Specifically, Complainant states she believed Bristol-Myers would be subject to a substantial financial penalty if it did not meet the sales call quota set forth in its co-promotion contract with Sanofi. By inflating sales call figures, she contends, Bristol-Myers could avoid this penalty. Therefore, Complainant concludes, call falsification resulted in a substantial financial benefit.

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[25] In assessing for objective reasonableness, the relevant consideration is the knowledge available to a reasonable person in the circumstances, including training and experience, of the complainant. *Lerbs*, 2004-SOX-8 at 13.

[26] The Act enumerates six types of fraud of which a reasonable belief may give rise to protected activity: (1) A violation of § 1341; (2) A violation of § 1343; (3) A violation of § 1344; (4) A violation of § 1348; (5) Any rule or regulation of the Securities Exchange Commission; (6) Any provision of federal law relating to fraud against shareholders. In this case, the Complainant has only alleged that she reasonably believed the Respondent's alleged activities were fraudulent against shareholders. Accordingly, the first five enumerated frauds are not applicable in this case. Therefore, in determining whether the Complainant engaged in protected activity, it is only necessary to consider the sixth enumerated fraud and determine whether the Complainant reasonably believed that the Respondent violated a federal law related to fraud against shareholders.

Complainant has argued that her allegations amounted to a reasonable belief that the Respondent violated 15 U.S.C. § 7241, section 302 of the Act. (See Complainant's Brief at 8-12).[27] § 302 requires corporate officers to certify that corporate reports do not contain untrue statements of material fact and fairly present, in all material respects, the financial condition of the corporation. It is therefore necessary to consider whether any of the Complainant's allegations constitute a reasonable belief that the Respondent violated § 302. In doing so, I consider separately three matters that the Complainant reported: (1) Her allegation that Bristol-Myers' management pressured representatives to misrepresent sales call data; (2) Her contention that other representatives falsified sales reports; and, (3) Her admission that that she falsified sales reports.

1. Allegations of Management Pressure to Misrepresent Sales Call Data

The Complainant cannot establish that her allegations of management pressure to misrepresent sales call data constitute protected activity as she has not demonstrated that she reasonably believed any relevant employer "conduct" amounted to a fraud against shareholders.

The element of "conduct" is central to protected activity under SOX. To be protected, the Act requires an employee's communicated belief to be predicated upon conduct. The plain language of the Act mandates as much, prohibiting discrimination against employees who "provide information…regarding any *conduct* which the employee reasonably believes constitutes a violation of [an enumerated fraud]." 18 U.S.C. § 1514A(a)(1) (emphasis added).[28] Therefore, as the Board explained in *Peck*, "protected complaints must be specific in relation to a given practice, condition, directive, or event." *Peck*, ARB No. 02-028 at 12.

In that vein, several Administrative Law Judges' decisions have considered whether a complainant's belief was based on employer conduct in assessing protected activity. In *Lerbs*, the Administrative Law Judge stated that a whistleblower's concerns must, "at the very least, reasonably identify a respondent's conduct that the complainant believes to be illegal." *Lerbs*, 2004-SOX-8 at 14 (citing *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995)). Similarly, in *Grant v. Dominion East Ohio Gas*, 2004-SOX-63 (ALJ March 10, 2005), the Administrative Law Judge required the complainant to set forth particular facts or circumstances that would support a reasonable belief in illegal conduct. *Grant*, 2004-SOX-63 at 41. Thus, to establish protected activity, the Complainant must demonstrate, by facts or circumstances, that the information she provided was based on a reasonable belief in fraudulent activity that is rooted in specific conduct. If the Complainant does identify relevant employer conduct, the judge must then determine whether it is reasonable to believe that the identified conduct amounted to an enumerated fraud. Therefore, a determination of the reasonableness of the Complainant's asserted belief is defined by the conduct she identifies.

[27] Complainant is not asserting that she identified this violation by code; however, as stated in *Collins*, she is not required to do so. Rather, she is arguing that the condition she perceived amounted to a violation of § 302.

[28] The issue of conduct presents a fine line in defining protected activity under SOX that merits some elucidation. As explained in *Collins supra*, a complainant need not prove that the conduct she believed to be fraudulent was in fact fraudulent; however, as explained in *Lerbs infra*, that belief must be based on actual conduct. Therefore, the Complainant faces a particularized burden with respect to Respondent conduct- she must demonstrate that conduct gave rise to her belief but she need not establish that this conduct was in fact fraudulent.

Here, the Complainant has made a minimal showing of Respondent conduct. The third allegation in her December 18 letter complained of "the incredible pressure placed upon representatives to misrepresent sales calls." (CX 5). Whether any such pressure was *placed upon* representatives depends on whether Bristol-Myers' officials "acted" in any way to do so. However, when the Complainant was asked on direct examination to explain this allegation, she responded only that she believed the requirement of ten sales calls per day to be excessive. (TR 80). At no point did she offer evidence that any Bristol-Myers official directed her to falsify sales data or acted in any way to compel her to do so.

This testimony is consistent with the Complainant's statements to Ms. Santos-Tharney and Ms. McElarney during Bristol-Myers' investigation. In January, 2005, Ms. Santos-Tharney had a telephone conversation with the Complainant to discuss the allegations in her December 18 letter. (TR 141). Ms. Santos-Tharney's notes from that conversation reflect the Complainant's displeasure with the call requirement but did not indicate that the Complainant identified any Bristol-Myers action or directive requiring her to falsify calls. (CX 19 at 26-35).[29] This account is consistent with the Complainant's recollection of the conversation. (TR 173-74). Similarly, in her February 10, 2005 discussion with Ms. McElarney, the Complainant pointed to no specific Bristol-Myers action to support her allegation of pressure to misrepresent data. Indeed, Ms. McElarney specifically asked her if she was ever directed to falsify data and the Complainant responded that she was not. (CX 19 at 43; TR 315).

The Complainant has raised only one iota of employer conduct that could conceivably pertain to pressure to misrepresent sales data. At a sales meeting, after announcing the ten sales call per day requirement, the Complainant alleges that Mr. Broadus commented, "If they want little red fire trucks, we give them little red fire trucks." (TR 31-32).[30] The Complainant later recalled that comment during her February 10 conversation with Ms. McElarney, specifically in response to Ms. McElarney's request that she explain the third allegation in her letter. (CX 19 at 41). She further stated that she interpreted this comment to mean "whatever you have to do, get it done!" *Id*.

Therefore, the Complainant, albeit minimally, has met the requirement of setting forth employer conduct upon which she based her belief. However, in evaluating that belief, it is only necessary to consider whether it was reasonable for the Complainant to believe that Mr. Broadus' comment amounted to a directive to falsify sales reports such that it would constitute fraud against shareholders.

The Complainant has not established that it was objectively reasonable to believe that this statement was a directive to falsify sales data. Specifically, Complainant has offered no evidence to support the position that a reasonable person in her circumstances would maintain such a belief. Moreover, there is circumstantial evidence that counters the reasonableness of such a belief, namely the absence of any reference to this comment in the Complainant's explanation of the third allegation in her letter and her statement to Ms. McElarney that no one in Bristol-Myers ever told her to falsify sales data. Therefore, the Complainant has not established an objectively

[29] At the hearing, Ms. McElarney identified these notes as Ms. Santos-Tharney's. (TR 370).
[30] It should be noted that, though much has been made of it throughout this litigation, the ten-call requirement, by itself, could not support a reasonable belief in the commission of an enumerated fraud.

reasonable belief that this comment amounted to a directive to falsify sales data and, by extension, constitutes fraud against shareholders.

Therefore, because she is unable to establish that she reasonably believed that any Respondent conduct constituted fraud against shareholders by pressuring representatives to falsify sales data, the Complainant's communications regarding these concerns are not protected under the Act.

2. Allegations that other Representatives Falsified Sales Call Reports

The Complainant has not established that her contention that other representatives also falsified sales call data constitutes protected activity. Again, she has presented only a minimal amount of conduct upon which any such belief was based. Her belief that this conduct amounted to fraud against shareholders is not objectively reasonable.

In her December 18 letter and throughout the Bristol-Myers investigation, the Complainant alleged generally that other sales representatives also misrepresented sales call data. As stated, her letter stated her concern "regarding appropriate business ethics as it relates to the accurate reporting of sales calls…" (CX 5). In her conversation with Ms. Santos-Tharney, she commented that misrepresenting calls is an industry-wide problem. (CX 19 at 34; TR 173-74). In her conversation with Ms. McElarney, the Complainant indicated that other representatives engaged in falsification but declined to identify them by name. (CX 19 at 43; TR 329). At no time during her reporting of this concern to Bristol-Myers did the Complainant offer specific instances upon which she based this general allegation.

In her testimony, the Complainant identified only one other representative whom she knew to falsify calls. She testified that her former partner Greg Lane had recorded calls on the same two out-of-territory doctors as she did. (TR 72-73). She later testified that these were calls he did not actually made. (TR 172-73). Therefore, the Complainant has referenced only Mr. Lane's alleged falsification as the conduct upon which she based her allegation that other representatives also falsified calls.[31] Accordingly, it is necessary only to consider the reasonableness of her belief that this conduct constituted fraud against shareholders.

As stated, the Complainant alleges that she believed the misrepresentation of sales call data violated a federal law related to fraud against shareholders. She has argued that § 302 of the Act, which requires accuracy in corporate disclosures, justifies her belief in a violation of such a federal law. In *Harvey v. The Home Depot, Inc.*, 2004-SOX-20 (ALJ May 28, 2004) and *Harvey v. Safeway, Inc.*, 2004-SOX-21 (ALJ Feb. 11, 2005), both of which involved the same complainant, the Administrative Law Judge addressed § 302 as a basis for protected activity under SOX.[32] In *Home Depot*, the Administrative Law Judge aptly observed that § 302 requires accuracy of reporting of material facts. *Home Depot*, 2004-SOX-20 at 15. He further explained,

[31] Although likely to be highly relevant to Bristol-Myers' internal investigation, it is immaterial for the purpose of defining protected activity under SOX whether the Complainant alleged conduct during Bristol-Myers investigation or in her presentation to this Court. What is relevant is that she demonstrates an element of conduct that gave rise to her belief.

[32] The same Administrative Law Judge issued both decisions.

in *Safeway*, that § 302 represents "Congress's intention to protect shareholders by requiring the accurate reporting of significant information concerning a corporation's financial condition." *Safeway*, 2004-SOX-21 at 31 (emphasis in original). Therefore, the Administrative Law Judge concluded that basing a SOX claim on a belief that certain conduct amounts to a violation of § 302 implicates a materiality threshold. *Home Depot*, 2004-SOX-20 at 15. Put differently, a complainant could only reasonably believe that perceived conduct was a fraudulent misstatement of corporate financial condition if that conduct was material toward the representation of that condition.[33]

Here, the Complainant's belief that Mr. Lane's alleged falsification of sales call data amounted to a fraudulent misrepresentation of the Respondent's financial condition is not objectively reasonable because the alleged conduct does not meet the materiality threshold. The Complainant testified that Mr. Lane falsified calls on two doctors. (TR 73). She further testified that she could not recall the number of falsified calls she alleged Mr. Lane recorded. (TR 172). Therefore, with respect to this allegation, the Complainant has set forth an undetermined number of false calls by one representative on two doctors. Although she has argued that inflating sales call figures is financially beneficial to the Respondent under its arrangement with Sanofi, she has not demonstrated how such a small amount of falsified call activity could lead to such a benefit. As such, she has not established that Mr. Lane's alleged falsified calls meets the materiality threshold as a fact that could fraudulently misrepresent the Respondent's financial condition. Therefore, a belief that such conduct amounted to this type of fraud against shareholders is objectively unreasonable. As a result, any complaints based on the allegation that other representatives also falsified sales calls does not constitute protected activity under the Act.

3. Admission that she Falsified Sales Call Reports

Lastly, any belief the Complainant may have had that her own falsification constituted fraud against shareholders is also objectively unreasonable. As is true with her second allegation, her own falsification does not rise to a level of materiality that could lead to a fraudulent misrepresentation of financial condition.

The Act does not preclude consideration of the reporting of one's own misconduct as protected activity. Indeed, the plain meaning of the Act defines protected activity, in pertinent part, as "any lawful act done by the employee to provide information, cause information to be provided, or otherwise assist in the investigation regarding any conduct which the employee reasonably believes constitutes [an enumerated fraud]." 18 U.S.C. § 1514A(a). The Act does not limit the investigation the Complainant assists or the conduct she reports to involve another person. Had Congress wanted to restrict protected activity to the reporting of someone else's misconduct, it could have; however, it did not.[34] Additionally, while case law involving federal whistleblower claims heard by this Court has not addressed the issue, a federal district court

[33] In each case, the Administrative Law Judge found that the alleged conduct did not rise to the requisite level of materiality to support a reasonable belief that the respondent fraudulently misrepresented its financial condition. *See Home Depot*, 2004-SOX-20 at 15 (finding that an individual claim of race discrimination could not materially impact the corporation's financial condition); *Safeway*, 2004-SOX-21 at 31 (finding that shortages in a single employee's paycheck did not represent significant information concerning a corporation's financial condition).

[34] *Cf Collins*, 334 F.Supp.2d at 1377 (finding that when Congress did not include limiting language in the Act, an inclusive reading is appropriate).

found that the reporting of one's own misconduct can constitute protected activity under the Michigan Whistleblower Act. *See Walcott v. Champion Int'l Corp.*, 691 F.Supp. 1052 (W.D. Mich. 1987).[35]

It is important to note that while Sarbanes-Oxley defines protected activity in terms of "any lawful act," this requirement refers to the lawfulness of the reporting, not the legality of the predicate conduct. The Act's legislative history makes this point clear, explaining, "Since the only acts protected are 'lawful' ones, the provision would not protect illegal actions, such as the improper public disclosure of trade secret information." S. REP. NO. 107-146 at 19 (2002). Therefore, so long as the *reporting* is lawful, even if the underlying conduct is illegal, the reporting itself of one's own misconduct may be protected under the Act.

In this case, the Complainant's reporting of her own falsification of sales calls was lawful.[36] Therefore, it could constitute protected activity under SOX; however, for the same reason as her allegation that other representatives also falsified calls, it does not. The Complainant admitted to recording twenty-two false calls on two doctors. (RX 4).[37] This level of activity does not meet the materiality threshold described above. Therefore, it is objectively unreasonable to believe that the Complainant's admitted falsification of sales calls constitutes a material fact that misrepresents Bristol-Myers' financial condition. Accordingly, complaints based upon this belief are not protected under the Act.

A final point concerning the objective unreasonableness of the Complainant's belief: The foregoing analysis considers the three matters separately. However, in considering them in concert, her belief remains objectively unreasonable. Specifically, even if the Complainant based her belief on Mr. Lane's and her own falsifications combined, that would amount to falsification by only two representatives on two doctors. This level of activity remains insufficient in meeting the materiality threshold to reasonably believe that it led to a fraudulent misrepresentation of Bristol-Myers' financial condition. Moreover, because the Complainant has established no objective link between Mr. Broadus' metaphorical statement and a directive to falsify calls, adding that matter to the equation provides no additional support for the objective reasonableness of her belief.[38]

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[35] That decision noted the reliance on federal whistleblower law in interpreting the Michigan act. *Walcott*, 691 F.Supp. at 1058.

[36] Her reporting occurred through her admissions to several Bristol-Myers officials, which amounts to assisting an investigation as prescribed by the Act, and to the degree that the third allegation in her December 18 memorandum refers to her own falsification.

[37] At the hearing, the Complainant disputed that the number of falsified calls was that high; however, she could not establish what she believed that number to be. (TR 126-30). Moreover, in considering the materiality of her admitted conduct, whether the number of calls she falsified was twenty-two or fewer is irrelevant. Additionally, although Mr. Broadus inquired into possible falsification involving two other doctors, this suspicion was never confirmed by Mr. Broadus, Ms. McElarney, or admitted to by the Complainant.

[38] It should also be underscored that the unreasonableness of the Complainant's belief is objective rather than subjective. I find the Complainant to be a credible witness and, therefore, also find that she subjectively holds her belief to be true. However, the facts surrounding this case do not give rise to finding of objective reasonableness. Because the Complainant's belief must be both subjectively and objectively reasonable under SOX, an absence of either negates a finding of protected activity.

Therefore, the Complainant has not established that her beliefs were objectively reasonable. Accordingly, she has not established that she has engaged in protected activity under the Act.

Although the Complainant has not established protected activity, I will proceed to adjudicate the remaining issues in the claim, assuming *arguendo*, that she has.

Knowledge of Protected Activity

An essential element of SOX complaint is that the Respondent was aware or had knowledge of the Complainant's alleged protected activity. *Grant*, 2004-SOX-63 at 44. In this case, there is little issue whether the Respondent had knowledge of the activity the Complainant alleges to be protected. Namely, the Respondent was abundantly aware of the Complainant's reported concerns regarding inaccurate sales call reporting by Bristol-Myers' representatives and the pressure Bristol-Myers' management placed on representatives to misrepresent sales calls. She addressed her December 18 letter to Ms. Allard and Ms. Santos-Tharney, both of whom confirmed receipt. She also communicated her concerns in conversations with Ms. Santos-Tharney and Ms. McElarney, which both acknowledged.

Therefore, assuming *arguendo* that the Complainant had engaged in protected activity, the Respondent was aware of that activity.

Unfavorable Personnel Action

Similarly, as the parties have stipulated that the Respondent terminated the Complainant, there is no issue as to whether she suffered an adverse employment action. Therefore, the Complainant has established this element of her claim.

Contributing Factor

To establish a violation under the Act, the Complainant must demonstrate that protected activity was a contributing factor in the unfavorable personnel action alleged in the complaint. 29 C.F.R. § 1980.109(a). The Complainant need not establish that her protected activity was the primary motivating factor in order to establish causation. *Halloum*, ARB No. 04-068 at 8. A "contributing factor" includes "any factor which, alone, or in connection with other factors, tends to affect in any way the outcome of the decision." *Halloum*, 2003-SOX-7 at 18 (citing *Marano v. Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993)). In establishing causation, a complainant may demonstrate the respondent's motivation through circumstantial evidence of discriminatory intent. *Platone v. Atlantic Coast Airlines, Inc.*, 2003-SOX-27 at 27 (ALJ April 20, 2004). When a complainant makes such a circumstantial showing, the Administrative Law Judge must evaluate all evidence pertaining to the mindset of the employer regarding the protected activity and the adverse action. *Id*. at 28.[39] Temporal proximity between the protected activity and the

[39] *Accord*, *Timmons v. Mattingly Testing Services*, 95-ERA-40 at 5 (ARB June 21, 1996).

adverse action is a significant factor in considering a circumstantial showing of causation. *Id*. However, its presence does not compel a finding of causation, particularly when there is a legitimate intervening basis for the adverse action. *Grant*, 2004-SOX-63 at 46.

In considering causation in this case, it is once again necessary to discern between the three matters that comprise the Complainant's alleged protected activity.

With respect to the first two matters- i.e. her allegations of management pressure to misrepresent sales call data and allegations that other representatives falsified call reports, there is no direct evidence that her reporting of either contributed to the Respondent's decision to terminate her. The Complainant has argued that three points of circumstantial evidence establish that the alleged protected activity was a contributing factor in the Respondent's decision to terminate: (1) That Bristol-Myers pursued its investigation of the Complainant's falsification of sales calls more vigorously after she reported her concerns; (2) That the bulk of Bristol-Myers' investigatory work concerning the Complainant involved her falsification of sales calls rather than her allegations in the December 18 letter; and (3) The temporal proximity between her reporting of her concerns and her termination. This circumstantial evidence, however, fails to establish the requisite element of causation for two reasons: (1) First, it gives no indication of a discriminatory mindset on the part of the Respondent; and (2) Second, it is overwhelmed by the direct evidence of a legitimate intervening basis for termination.

The circumstantial evidence does not indicate any discriminatory mindset on the part of the Respondent. To that end, Complainant's first point is not well supported by the facts. Complainant has argued that if call falsification alone were as serious a violation as Bristol-Myers claims, it would have terminated the Complainant immediately after her December 14 admission. However, the testimony of Ms. Allard and Ms. McElarney establishes that such an investigation is typically an involved process. As Ms. Allard explained, she and Mr. Broadus had begun looking into their concerns that the Complainant falsified calls prior to the Complainant's December 14 meeting with Mr. Broadus. (TR 282). Those concerns, coupled with the Complainant's admissions on December 14 dovetailed into a full investigation that lasted into February, 2006. Therefore, the process of investigating into the Complainant's call falsification had begun before she submitted her December 18 letter and progressed toward a conclusion afterward. Therefore, it is unreasonable to glean any discriminatory intent from the fact that Respondent did not terminate the Complainant immediately after her admission and took more vigorous steps to investigate the matter thereafter.

Second, Bristol-Myers' investigation into the Complainant's December 18 letter may be characterized as cursory.[40] However, there is no link between the brevity of this investigation and the Respondent's decision to terminate. Moreover, much of the lack of depth of the investigation is attributable to the Complainant herself. Specifically, the Complainant failed to provide Ms. McElarney or Ms. Santos-Tharney with specific instances of management pressure to falsify sales calls or the names of other representatives who had misrepresented data. Therefore, the degree to which Bristol-Myers' investigation into the December 18 memorandum

[40] Indeed, while McElarney testified that she conducted two investigations- one into the allegations contained in the memorandum and another into the Complainant's falsification of sales reports- her questions and report reflect that the bulk of her efforts focused on the latter.

was in fact cursory does not evidence a discriminatory mindset on the part of the Respondent that would support a finding of causation.[41]

Additionally, while there is a degree of temporal proximity between the alleged protected activity and the adverse action, there was also a significant legitimate intervening basis for the Respondent to terminate, namely the Complainant's own admitted falsification of sales call data. The Respondent has provided substantial direct evidence that this was the reason for her termination, namely that falsification was a violation that resulted in termination and it determined, based on an investigation into the matter and the Complainant's own admission, that she falsified calls. In *Safeway*, the Administrative Law Judge found "the direct evidence [of a legitimate grounds for termination] overwhelms the circumstantial evidence [of adverse action due to alleged protected activity]" and found no causation accordingly. *Safeway*, 2004-SOX-21 at 36. I reach a similar conclusion here. Because the Complainant's falsification constitutes a legitimate intervening basis for which the evidence is overwhelming, the temporal proximity between the Complainant's alleged protected activity and adverse action does not establish causation.

Therefore, the Complainant has not established, by either direct or circumstantial evidence, that either of first two matters that comprise the alleged protected activity contributed to her termination.

The Complainant's own admission of falsification, as alleged protected activity, likewise does not constitute a contributing factor in her termination. The *Marano* standard allows that any factor, alone or in connection with other factors that leads to the adverse action establishes causation. *Marano*, 2 F.3d at 1140. However, despite its noticeable inclusivity, *Marano* still imposes a requirement, namely that the alleged protected activity be a "factor."[42] In the SOX context, the protected activity is the reporting of certain information. Thus, to establish causation under the *Marano* standard, the Complainant must demonstrate that the reported information was a factor in the adverse employment action.

With respect to her own admissions of falsification, the Complainant has made no such showing. While her admissions and the Respondent's stated reason for her termination involve the same subject matter, that relationship, by itself, does not establish causation. Rather, the Complainant must demonstrate that her *reporting* of these admissions constitutes a factor in the Respondent's decision. Here, the Complainant has merely established that her admissions provided the Respondent with evidence of a violation upon which it predicated its decision; however, she has not demonstrated that her termination was predicated, in any way, upon her communication of this information. Accordingly, the overwhelming weight of the evidence establishes that the Complainant was terminated for the *act* of falsifying calls, not for the *reporting* of doing so. Therefore, even if her own admissions constitute protected activity, she is

[41] Moreover, other circumstantial evidence exists to show that the Respondent held no such discriminatory mindset. Specifically, after the Complainant postponed several subsequent conversations, Ms. McElarney herself initiated contact with the Complainant to see if she wanted to discuss anything further. Had Bristol-Myers' possessed a discriminatory mindset toward the Complainant's concerns, it is doubtful that Ms. McElarney would have made such an effort.

[42] Here, it is important to reiterate that the Complainant carries the burden of proof by preponderance of the evidence in all such showings.

unable to establish that they give rise to the necessary element of causation, as required by the Act.

Therefore, assuming *arguendo* that the Complainant has established protected activity, she has not established that any such protected activity was a contributing factor in her termination.

Clear & Convincing Evidence

If the Complainant demonstrates that she has engaged in protected activity, the Respondent knew of her protected activity, she suffered an adverse employment action, and the protected activity contributed to the adverse action, she has established a violation under SOX. 29 C.F.R. § 1980.109(a). The Respondent could only then avoid liability by demonstrating, by clear and convincing evidence, that it would have taken the same adverse action in the absence of any protected activity. *Id*. In this case, because the Complainant has demonstrated neither protected activity nor causation, she has not established a violation under SOX. However, even if she had established a violation, the Respondent would avoid liability because it has demonstrated clearly and convincingly that it would have terminated her absent any such protected activity.

To meet this burden, the Respondent must demonstrate more than the preponderance of the evidence but need not prove its position beyond a reasonable doubt. *See Yule v. Burns Int'l Sec. Serv.*, 1993-ERA-12 (Sec'y May 24, 1995). In *Halloum*, the Administrative Law Judge found that adverse action taken to enforce explicit company policy, which the complainant knew and violated, met this standard. *Halloum*, 2003-SOX-7 at 19, *aff'd* ARB No. 04-068.

For similar reasons, the Respondent's decision to terminate the Complainant also meets this standard. Bristol-Myers' policy prohibiting the falsification of sales calls is explicit and well-documented. It appears in the Code of Conduct for Sales Representatives (RX 15), the Standards of Business Conduct and Ethics (CX 20), and the Compliance Code of Conduct (RX 14). Termination as a consequence for violating this policy appears in these documents as well. In addition to being consistently documented, the evidence shows that the policy was consistently practiced. Ms. Allard testified that it is standard for Bristol-Myers to terminate a sales representative it finds to have falsified. (TR 254, 277, 292). Ms. McElarney testified that she had never recommended anything but termination upon finding falsification. (TR 322-23). Additionally, the Complainant indicated she was aware of the policy contained in the documents. (RX 16, RX 17, TR 137-40). Therefore, in terminating the Complainant for falsifying sales call reports, the Respondent acted to enforce an explicit policy of which the Complainant was aware.[43] As in *Halloum*, this constitutes clear and convincing evidence that it would have taken the same action in the absence of any alleged protected activity.

Therefore, even assuming *arguendo* that the Complainant established a violation under SOX, the Respondent would avoid liability under the Act.

[43] Moreover, investigation into the false sales call reports had begun well before any of the Complainant's alleged protected activities.

CONCLUSIONS

The Complainant has not established a violation under the Act as she has not demonstrated that she has engaged in protected activity. Additionally, she has not demonstrated that any alleged protected activity was a contributing factor in her termination. Moreover, even if a violation were found, the Respondent has demonstrated, by clear and convincing evidence, that it would have terminated the Complainant in the absence of any alleged protected conduct.

ORDER

It is recommended that the Complainant's complaint be DISMISSED.

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RICHARD A. MORGAN
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of the administrative law judge's decision. *See* 29 C.F.R. § 1980.110(a). The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1980.110(c). Your Petition must specifically identify the findings, conclusions or orders to which you object. Generally, you waive any objections you do not raise specifically. *See* 29 C.F.R. § 1980.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210.

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1980.109(c). Even if you do file a Petition, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1980.109(c) and 1980.110(a) and (b).